



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 4, 1993

Mr. Ted M. Kerr  
Kerr, Fitz-Gerald & Kerr, L.L.P.  
Century Plaza Building  
Suite 600  
310 W. Wall Street  
Midland, Texas 79701

OR93-268

Dear Mr. Kerr:

As attorney for the Midland Independent School District ("MISD"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 18853.

MISD received a request for several items of information. You say MISD will release items 6, 7 and 8, but you contend that the remaining items are excepted from required public disclosure based on sections 3(a)(1), 3(a)(11), and 3(a)(14) of the Open Records Act. You also raise the Family Educational Rights and Privacy Act (FERPA) of 1974, 20 U.S.C. § 1232g, and Rule 508 of the Texas Rules of Civil Evidence.

We will begin with your contention that certain documents are excepted from required public disclosure under section 3(a)(11) of the Open Records Act. You seek to apply this exception to several memoranda, lists of students, messages, an invoice from an athletic supply company, and a draft of a letter.<sup>1</sup>

Section 3(a)(11) excepts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." Prior decisions of this office have applied this exception to inter-agency and intra-agency memoranda and letters that contain advice, opinion, or recommendation intended for use in the governmental entity's policymaking or deliberative process. See Open Records Decision No. 574 at 1-2 (1990). For several months now, the effect of the section 3(a)(11)

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<sup>1</sup>You raise section 3(a)(11) in regard to the documents you have numbered as 6, 8, 9, 10, 14, 15, 29, 30, 31, 44, 55, 56, 59, 61, 62, 63, 65, 67, and 96.

exception has been the focus of litigation. In *Texas Dept of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin, 1992, no writ), the Third Court of Appeals held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath* at 413.

Consequently, we are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning the information for which you claim the section 3(a)(11) exception and asking that you once again review the information and your initial decision to seek closure of it. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the information, you must resubmit your request and the information, along with your arguments for withholding it pursuant to section 3(a)(11). You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released the information.

Section 14(e) of the Open Records Act incorporates the requirements of FERPA into the Open Records Act. FERPA provides as follows:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization . . .

20 U.S.C. § 1232g(b)(1). "Education records" are records that:

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

*Id.* § 1232g(a)(4)(A).

You have not indicated that any parents have consented in writing to the release of these educational records. Thus, FERPA requires MISD to withhold information that identifies students or parents. *See* Open Records Decision No. 332 (1982). However, MISD may not withhold entire documents; MISD must delete information only to the extent "reasonable and necessary to avoid personally identifying a particular student" or "one or both parents of such a student." *See id.* at 3. Thus, only information identifying

or tending to identify students or their parents must be withheld from required public disclosure under section 14(e) of the Open Records Act, in conjunction with FERPA.


You assert rule 508 of the Texas Rules of Civil Evidence excepts from required public disclosure the documents you numbered as 64, 66, 68, 69, 70, 71, 72 though 76, and 78 through 82. We assume you raise rule 508 in conjunction with section 3(a)(1) of the Open Records Act. Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory or by judicial decision." Rule 508(a) of the Texas Rules of Civil Evidence, which generally provides a privilege to refuse to disclose the identity of an informer, provides as follows:

The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

The Texas Rules of Civil Evidence govern civil proceedings in all courts of Texas other than small claims courts, except as otherwise provided by statute. Tex. R. Civ. E. 101(b). Thus, if a privilege contained in the Texas Rules of Civil Evidence applies, it applies only in the context of a civil proceeding and only if the court in that proceeding deems it applicable. Consequently, these rules do not deem information confidential for purposes of section 3(a)(1) of the Open Records Act. *Cf.* Open Records Decision No. 575 (1990) (section 3(a)(1) of the Open Records Act does not encompass discovery rules). Thus, you may not withhold information based on Rule 508 of the Texas Rules of Civil Evidence.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Kay H. Guajardo  
Assistant Attorney General  
Opinion Committee

KHG/KKO/le

Ref: ID# 18853  
ID# 19501

Enclosures: submitted documents

cc: C.H. (Hal) Brockett, Jr. Esquire  
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(w/o enclosures)